NO. HHD CV 11-5035304-S	:	SUPERIOR COURT
ROGER EMERICK	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
TOWN OF GLASTONBURY	:	MAY 14, 2015

MEMORANDUM OF DECISION RE: MOTIONS FOR SUMMARY JUDGMENT (#202, #208)

I

PROCEDURAL HISTORY

The present action was commenced by the plaintiff, Roger Emerick, on February 15, 2011, against the defendant, the Town of Glastonbury. On October 29, 2013, the plaintiff filed a seven count amended complaint, the operative complaint, against the defendant. Count one of the amended complaint sounds in private nuisance, and alleges the following facts. The plaintiff is the owner of 580 Hopewell Road, South Glastonbury, Connecticut. The plaintiff owned the property since 1980.

The plaintiff's property has been damaged by upstream development, storm water increase, and water quality degradation. Specifically, the defendant has continued upstream development, and has more than doubled the number of culverts since 1981 that dump water

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upstream of the plaintiff's property. In addition, since 1980, nearly all of the streets upstream from the plaintiff's property have been curbed. By drastically increasing the amount of upstream culverts, curbing the roads, and installing storm sewers, the defendant failed to follow the relevant water runoff management plans, including the 1981 Town of Glastonbury Master Drainage Report, the 1989 Inland Wetlands and Watercourses Commission Regulation, and the 2004 Storm Water Management Plan. The 1981 Master Drainage Report, in particular, noted that increased development and stormwater flow would cause increasing and irreparable environmental damage, and that the defendant should limit stormwater to its current level.

The defendant's accumulated stormwater management conduct has resulted in magnified and irreversible topographical and ecological damage to the plaintiff's property since the 1990's, and continuing to the present. In particular, the stormwater damage has resulted in a decrease in water quality, stilting of water, and dramatic negative damage to local wildlife. During the 1980's, the plaintiff expressed concerns to the Conservation Commission, but no ameliorative action was taken. In the 1990's, the plaintiff brought water samples to the Town Health Department, but received no reply. In January 2010, the plaintiff brought pictures of the damaged areas to the Town Council and the Conservation Commission, but did not receive a response.

The plaintiff's remaining causes of action, with the exception of count seven, incorporate the allegations in count one, and are largely based upon the allegations contained in the first count. The remaining counts in the complaint are as follows: count two, alleging reckless and wanton conduct; count three, alleging trespass; count four, alleging the violation of General Statutes § 13a-138; count five, alleging intentional infliction of emotional distress; and count six, alleging negligent infliction of emotional distress.

Count seven of the amended complaint, alleging breach of fiduciary duty, also incorporates the allegations in count one. Count seven, however, further alleges the following largely unrelated facts. The defendant breached a fiduciary duty when it failed to return a piece of property to his grandfather after it was no longer used as a public school. Specifically, on or around 1925, the plaintiff's great grandfather, without compensation, allowed the town to use about four acres of his property for a school, with the understanding that the property would be returned if the use was discontinued. The school burned down, and the use was discontinued. Around 1945, the plaintiff's grandfather owned the land, and he requested that the land should be returned to him. After the defendant denied the request, the plaintiff's grandfather placed a bid for $500. The town gave the property to another, even though the competing bid was only $1. Thus, the defendant failed to recognize his grandfather's proper bid for the property, and

gave it to another party in a closed bid. When the defendant obtained permission from the plaintiff's great grandfather to use the land for a public school, the defendant created a fiduciary duty, and was required to act in the best interest of the great grandfather and his heirs.

The plaintiff seeks compensatory and punitive damages, as well as injunctive and declaratory relief, as to all of the alleged causes of action.

On November 3, 2014, the defendant filed a motion for summary judgment. The motion was accompanied by a memorandum and attached documents. On November 17, 2014, the plaintiff filed a motion for summary judgment. In support, the plaintiff included exhibits, including his own affidavit and an expert affidavit. On December 18, 2014, the plaintiff filed an objection to the defendant's motion for summary judgment. On December 23, 2014, the defendant filed an objection to the plaintiff's motion. On January 21, 2015, the plaintiff filed a reply to the defendant's objection. Finally, on the same day, the defendant filed a reply to the plaintiff's objection to the motion for summary judgment. These matters were heard on short calendar on January 26, 2015.

II

DISCUSSION

A. Applicable Law

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Brooks* v. *Sweeney*, 299 Conn. 196, 210, 9 A.3d 347 (2010). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for

summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11, 938 A.2d 576 (2008).

"Summary judgment may be granted where the claim is barred by the statute of limitations. . . . Summary judgment is appropriate on statute of limitations grounds when the

material facts concerning the statute of limitations [are] not in dispute. . . ." (Citation omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77 A.3d 726 (2013). "[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." Id., 321.

There are two motions for summary judgment before the court. The defendant's motion will be addressed first.

B. Defendant's Motion for Summary Judgment

The defendant moves for summary judgment as to the amended complaint, and argues that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law, on the following grounds: (1) all counts fail because the alleged causes of action, including nuisance, reckless and wanton conduct, trespass, intentional infliction of emotional distress, violation of General Statutes § 13a-138, negligent infliction of emotional distress, and breach of fiduciary duty, are barred by the applicable statute of limitations; (2) count one, the private

nuisance claim, is insufficient as a matter of law because the plaintiff cannot prove the necessary elements of a private nuisance claim; (3) count two, reckless and wanton conduct, and count five, intentional infliction of emotional distress, fail because the Town has governmental immunity for its intentional torts; (4) count three, trespass, fails because the defendant is not liable for intentional torts; (5) count six, negligent infliction of emotional distress, fails because it is not a recognized cause of action in Connecticut; (6) count seven, breach of fiduciary duty, fails because the plaintiff cannot establish the necessary elements of a fiduciary duty claim.

The plaintiff counters that there are genuine issues of material fact as to each ground. First, as to the statute of limitations arguments for count one, nuisance, and count three, trespass, the plaintiff argues that there is a continuous nuisance and trespass, where the injury is repeated and each new occurrence causes a fresh nuisance and trespass with incumbent injury and distress. As to the statute of limitations for count seven, breach of fiduciary duty, the plaintiff argues that he did not discover the false sale until within the previous two years of filing the complaint. As to the defendant's argument that the nuisance claim fails because the defendant's conduct was not an unreasonable interference with the plaintiff's property, the plaintiff counters that this element is a question for the factfinder, and that he has provided sufficient evidence to raise a genuine issue of material fact. As to the defendant's argument that the nuisance claim

fails because the defendant's conduct did not constitute a positive act, the plaintiff argues that the defendant's improper upstream development was the result of the municipal review and approval process. As to the defendant's argument that reckless and wanton conduct is barred by governmental immunity, the plaintiff counters that cases equate wanton, reckless, wilful, and intentional *conduct*, but that cases do not equate reckless conduct with wilful misconduct. As to governmental immunity for the intentional infliction of emotional distress, the plaintiff argues that the town may not be liable for the intentional infliction of emotional distress by its *employees*, but that the town may be liable for its own intentional infliction of emotional distress. As to the argument that trespass is an intentional tort for which liability cannot lie as to the town, the plaintiff contends that the present case involves a recurring trespass and nuisance that is specifically allowed by both the common law and General Statutes § 52-577n (a) (1) (C). As to the argument that the General Statutes § 13a-138 action is barred by the applicable fifteen year statute of limitations, the plaintiff counters that there have been continuous construction and damage, and that he is entitled to the damage that has occurred since 1996. As to the argument that there is no cause of action for negligent infliction of emotional distress based on damage to property, the plaintiff argues that this ignores the destruction of habitat and wildlife, as well as interference with the recreational use and enjoyment of the plaintiff's property. Finally, the

plaintiff contends that there is a genuine issue of material fact as to whether the defendant had a fiduciary relationship with the plaintiff.

1

Statute of limitations under General Statutes § 52-577 as to nuisance (count one), trespass (count three), intentional infliction of emotional distress (count five)

The applicable statute of limitations for nuisance,[1] trespass,[2] intentional infliction of emotional distress,[3] and breach of fiduciary duty[4] actions is three years, pursuant to General

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1 "The language of the statutes, coupled with the decisions at the superior court level, suggest that absolute nuisance is subject to the three-year limitation period, whereas negligent nuisance is subject to the two-year limitation period. Section 52-577 has been usually held as the applicable statute of limitations for nuisance claims." (Internal quotation marks omitted.) *Bourque* v. *Enfield*, Superior Court, judicial district of Hartford, Docket No. CV-91-0393740-S (January 5, 1994, *Wagner, J.*) (10 Conn. L. Rptr. 574, 575). In the present case, the plaintiff's nuisance claim alleges that the town's misconduct was reckless, wanton, and wilful, and not merely negligent. As such, the statute of limitations in § 52-577 applies to the nuisance claim.

2 "The applicable statute of limitations for trespass actions is General Statutes § 52-577 . . ." *Rickel* v. *Komaromi*, 144 Conn. App. 775, 782, 73 A.3d 851 (2013).

3 "The applicable statute of limitations period for a claim of intentional infliction of emotional distress is three years pursuant to General Statutes § 52-577. *DeCorso* v. *Watchtower Bible & Tract Society of New York, Inc.*, 78 Conn. App. 865, 873, 829 A.2d 38 (2003)." (Internal quotation marks omitted.) *St. Germain* v. *Charter Communications, LLC*, Superior Court,

Statutes § 52-577. Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." "The three year limitation period of § 52-577 . . . begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury. . . . The relevant date of the act or omission complained of, as that phrase is used in § 52-577, is the *date when the negligent conduct of the defendant occurs* and not the date when the plaintiffs first sustain damage. . . . Ignorance of his rights on the part of the person against whom the statute has begun to run, will not suspend its operation." (Citations omitted; emphasis added; internal quotation marks omitted.) *Piteo* v. *Gottier*, 112 Conn. App. 441, 445-46, 963 A.2d 83 (2009). Thus, "[w]hen conducting an analysis under § 52-577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Internal quotation marks omitted.) *Rickel* v. *Komaromi*, 144 Conn. App. 775, 782, 73 A.3d 851 (2013).

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judicial district of Windham, Docket No. CV- 06-4004064-S (March 4, 2011, *Riley, J.*) (52 Conn. L. Rptr. 619, 622).

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"Breach of fiduciary duty is a tort action governed by the three-year statute of limitations contained within General Statutes § 52-577." *Ahern* v. *Kappalumakkel*, 97 Conn. App. 189, 192 n.3, 903 A.2d 266 (2006).

In the present case, the action was commenced on February 15, 2011. As to the actions that are based on the damage to plaintiff's personal property, and that apply the three year limitation periods of § 52-577 (nuisance, trespass, and intentional infliction of emotional distress), in order to survive the statute of limitations period, the defendant's alleged wrongful conduct must have occurred within the three year period between February 15, 2008, and February 15, 2011. In the present case, the plaintiff has alleged that the defendant has continued upstream development since 1981, but the complaint does not state when, or if, the defendant has stopped further upstream development. The complaint does, however, imply that there was further upstream development since at least 2004. This is because the amended complaint alleges that, *despite the policy in the 2004 Storm Water Management Plan reports*, the defendant has continued approving commercial and residential development, *and upgrading or installing infrastructure through its highway division* that has led to an increase in stormwater discharge upstream from the plaintiff's property. In his affidavit, the plaintiff has similarly alleged that "several years ago," at some time in the 2000's, the defendant widened, repaved, and recurbed a street immediately upstream from the plaintiff's property, causing increased stormwater to enter the plaintiff's property. (Affidavit of Plaintiff, ¶ 8). The allegations in the amended complaint and the evidence show that the defendant's wrongful conduct may have occurred after February

15, 2008, which would fall within the statute of limitations period.

The defendant has not submitted any evidence that would establish that there is no genuine issue of material fact that it was not engaged in active wrongful conduct after February 15, 2008. As such, the defendant has not met its burden of showing the absence of a genuine issue of material fact that the nuisance, trespass, and intentional infliction of emotional distress claims have been commenced outside of the statutory limitation period of § 52-577.

2

Continuing nuisance and continuing trespass (alternative § 52-577 statute of limitations argument for count one and count three)

Even if the court was to conclude that there is no genuine issue of material fact that the defendant did not actively engage in any misconduct after February 15, 2008, the plaintiff also argues that the continuous nuisance and continuous trespass doctrine applies. In *Rickel* v. *Komaromi*, supra, 144 Conn. App. 775, the court addressed a matter of first impression, namely, whether the applicable statute of limitations runs differently for a continuing nuisance or trespass than it does for a permanent nuisance or trespass. Id., 786. More specifically, the court addressed whether, in the context of § 52-577 and § 52-584, the "date of the act or omission

complained of" and "the date when the injury [was] first sustained or discovered" depend on whether the alleged instances of nuisance and trespass are continuing or permanent. Id. The court noted that "the distinction between temporary and permanent nuisances and trespasses for statute of limitations purposes has been broadly and readily adopted." Id., 787.

"The nature of a nuisance as permanent or temporary has an important bearing on the running of the statute of limitations. . . . For limitations purposes, a permanent nuisance claim accrues when injury first occurs or is discovered while a temporary nuisance claim accrues anew upon each injury . . . . Likewise, [i]n the case of a continuing trespass, the statute of limitations does not begin to run from the date of the original wrong but rather gives rise to successive causes of action each time there is an interference with a person's property. . . . Thus, if there are multiple acts of trespass, then there are multiple causes of action, and the statute of limitations begins to run anew with each act. . . . On the other hand, if a trespass is characterized as permanent, the statute of limitations begins to run from the time the trespass is created, and the trespass may not be challenged once the limitation period has run." (Citation omitted; internal quotation marks omitted.) Id.

"Generally, whether a nuisance is deemed to be continuing or permanent in nature determines the manner in which the statute of limitations will be applied. . . . If a nuisance is not

abatable, it is considered permanent, and a plaintiff is allowed only one cause of action to recover damages for past and future harm. The statute of limitations begins to run against such a claim upon the creation of the nuisance once some portion of the harm becomes observable. . . . A nuisance is deemed not abatable, even if possible to abate, if it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely. . . . However, a nuisance is not considered permanent if it is one which can and should be abated. . . . In this situation, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie, and the statute of limitation will begin to run at the time of each continuance of the harm." (Citation omitted; internal quotation marks omitted.) Id., 788.

"Similarly, with respect to trespass, [t]he typical trespass . . . is complete when it is committed; the cause of action accrues, and the statute of limitations begins to run at that time. . . . However, when the defendant erects a structure or places something on or underneath the plaintiff's land, the defendant's invasion continues if he fails to stop the invasion and to remove the harmful condition. In such a case, there is a continuing tort so long as the offending object remains and continues to cause the plaintiff harm. . . . In other words, each day a trespass of this type continues, a new cause of action arises." (Internal quotation marks omitted.) Id., 788-89.

One of the cases that the court in *Rickel* cited, *Fradkin* v. *Northshore Utility District*, 96

Wash. App. 118, 977 P.2d 1265 (1999), further expanded on the distinction between a continuing and permanent trespass. The court in *Fradkin* held: "*Bradley* [v. *American Smelting and Refining Co.*, 104 Wash. 2d 677, 709 P.2d 782 (1985)] and *Doran* [v. *Seattle*, 24 Wash. 182, 64 P. 230 (1901)] are consistent with authority in other jurisdictions holding that the *reasonable abatability of an intrusive condition is the primary characteristic that distinguishes a continuing trespass from a permanent trespass.* A trespass is abatable, irrespective of the permanency of any structure involved, so long as the defendant can take curative action to stop the continuing damages. The condition must be one that can be removed without unreasonable hardship and expense. If an encroachment is abatable, the law does not presume that such an encroachment will be permanently maintained. The trespasser is under a continuing duty to remove the intrusive substance or condition. *Periodic flooding due to defective construction of a drainage system is a recognized fact pattern in the category of continuing trespass*." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *Fradkin* v. *Northshore Utility District*, supra, 125-26. Furthermore, § 899 of the Restatement (Second) of Torts, comment (d), states that "continuing trespass" similarly includes trespass "caused by the erection of a structure upon the land of another *or when there is a series of harms caused by the existence of a structure or the operation of a business outside the land . . . .*" (Emphasis added.) 4

Restatement (Second), Torts, Statutes of Limitations § 899, comment (d), p. 443 (1977).

After discussing the distinction between temporary and permanent nuisance and trespass for statute of limitations purposes, the court in *Rickel* held: "The plaintiff alleged facts in her complaint to support her claims that the defendants' conduct in planting the bamboo and then failing to control its growth resulted in a continuing nuisance and a continuing trespass. The plaintiff's continuing nuisance and continuing trespass allegations therefore were part of the defendants' initial burden to rebut in its motion for summary judgment, by demonstrating that there were no genuine issues of material fact regarding the application of the relevant statutes of limitations. In seeking summary judgment, however, the defendants referred only to three dates to establish the untimeliness of the plaintiff's claims - the 1997 planting of the bamboo, the 2005 installation of the patio, and the 2010 commencement of the action. They ignored other allegations in the complaint by limiting their focus to these dates." Id., 789-90.

The court in *Rickel* further held: "By conducting its summary judgment analysis only on the basis of the 1997, 2005 and 2010 dates, the court, with respect to the trespass and nuisance counts, did not address the allegations of the defendants' failure to control the underground spread of the bamboo rhizomes and the above ground spread of the bamboo on the plaintiff's property. This continuing underground and above ground activity on the plaintiff's property

created a genuine issue of material fact about whether §§ 52-577 and 52-584 were a bar to all of her claims encompassed in her trespass and nuisance counts." Id., 790-91.

The *Rickel* court concluded: "The [trial] court erred in rendering summary judgment without addressing the plaintiff's continuing nuisance and continuing trespass allegations, because, by doing so, the court overlooked genuine issues of material fact about whether the alleged nuisance and trespass were continuing or permanent, and thus whether the applicable statutes of limitations had run on the plaintiff's nuisance and trespass claims." Id., 792.

As mentioned, in the present case, the action was commenced on February 15, 2011. The remaining issue is when the applicable statute of limitations begins to run. In order to answer that question, the critical issue before the court is whether the alleged nuisance and trespass in the present case is abatable, and, as a result, continuous. Here, the plaintiff alleges in his amended complaint that "[f]easable and [p]rudent alternative were available to serve the community's need to divert and drain storm water safely and appropriately on public streets and roadways associated with municipal development without interference with, and damage to, [the] [p]laintiff's property . . . . Alternatives such as reduced development if necessary, curbless roads, pervious roadways, and/or directing discharge to pervious locations and away from wetlands and waterways, as well as other methods existed for stormwater control and reduction."

The plaintiff further alleges: "The nuisance/trespass from inordinate and unnatural increased water flow during inclement weather caused by stormwater occurs on a temporary but recurring basis, with each episode causing a new nuisance/trespass, and resulting in incremental damage. The recurring damage to habitat and wildlife has *always been and remains preventable* with published Low Impact Development technology . . . ." (Emphasis added.)

The defendant has not submitted any evidence to rebut the plaintiff's continuing nuisance and continuing trespass allegations, and, as such, the defendant has not met its initial summary judgment burden.[5] [6]

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[5] "The plaintiff's continuing nuisance and continuing trespass allegations . . . were part of the defendants' initial burden to rebut in its motion for summary judgment." *Rickel* v. *Komaromi*, supra, 144 Conn. App. 790.

[6] Even to the extent that the defendant has met his initial burden to show that the nuisance and trespass was not abatable, and, therefore, permanent, the plaintiff has submitted evidence that creates a genuine issue of material fact. Firstly, the plaintiff has authenticated and incorporated all of the allegations in the operative complaint in his affidavit. (Plaintiff's affidavit, ¶ 4). Secondly, the plaintiff has provided the expert affidavit of Sigrun Gadwa, an ecologist, registered soil scientist, and professional wetland scientist. Gadwa notes that "remedial work could still be done, with grant assistance; likely many other parts of the Roaring Brook watershed could also be restored, helping abate the current nuisance and trespass of which [the plaintiff] complains." (Affidavit of Sigrun Gadwa, ¶ 9). Gadwa further states that the town's conduct is the "cause of the temporary and recurring nuisance and trespass damage of which the plaintiff complains." (Affidavit of Sigrun Gadwa, ¶ 13). Finally, and most importantly, Gadwa concludes: "The nuisance and trespass complained of is abatable. At a minimum, adoption of

In the case of a continuing nuisance or trespass, the statute of limitations does not begin to run from the date of the original wrong, but rather gives rise to successive causes of action each time there is an interference with a person's property. Hence, to the extent that there is a continuous and reoccurring interference with the plaintiff's property, the statute of limitations begins to run anew with each interference. Under the present facts, the plaintiff has alleged that there has been continuous and reoccurring interference and damage, which creates a genuine issue of material fact as to whether the plaintiff's claims for trespass and nuisance are barred by the applicable statute of limitations.

Finally, the conclusion that there is a genuine issue of material fact as to whether the plaintiff's claims for trespass and nuisance are barred by the applicable statute of limitations is also consistent with the observation in *Rickel* that "[t]he complexity that commonly characterizes

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Low Impact Development and Stream Channel Protection Criteria for future development, as well as any redevelopment, and sometimes with the assistance of grant monies, would, in time, ameliorate the nuisance/trespass of stormwater upon his property and the damage it causes." (Affidavit of Sigrun Gadwa, ¶ 14).

Thus, even to the extent that the defendant has met its initial burden, the plaintiff has presented a genuine issue of material fact, through both his own and expert evidence, as to whether the nuisance and trespass is abatable. The plaintiff even includes suggested methods of reducing damage to the plaintiff's property. As such, because there is a genuine issue of material fact as to whether the reoccurring nuisance and trespass is abatable, there is also a genuine issue of material fact as to whether there is a continuing nuisance or continuing trespass.

a nuisance claim is heightened when the issues raised by that claim are entangled with those raised by a trespass claim. The grafting together of these claims, when combined with the inquiry of whether such nuisances and trespasses are continuing or permanent, presents a knotty thicket of deeply factual issues that raise genuine issues of material fact and are inappropriate to decide on a motion for summary judgment." *Rickel* v. *Komaromi*, supra, 144 Conn. App. 792.

3

Statute of limitations under General Statutes § 52-577 as to breach of fiduciary duty (count seven)

As to breach of fiduciary duty, that claim is based on a different set of facts than the claims for nuisance, trespass, and intentional infliction of emotional distress. In regard to the breach of fiduciary duty, the latest date of the act or omission complained of was on or about 1945, when the defendant placed the land of the plaintiff's grandfather up for a bid, despite allegedly not having a legal right to the land.[7] Thus, because the statute of limitations began to run on or about 1945, and because the plaintiff has not commenced the present action until February 15, 2011, there is no genuine issue of material fact that count seven is barred by the

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[7] The plaintiff also allegedly discovered that the 1945 bid by Mr. Quagliaroli was for only $1, whereas the grandfather's bid was for $500.

applicable three year statute of limitations.[8]

4

Statute of limitations under General Statutes § 52-584 as to reckless and wanton conduct (count two) and negligent infliction of emotional distress (count six)

The applicable statute of limitations for count two, "reckless and wanton conduct," and count six, negligent infliction of emotional distress,[9] is found in General Statutes § 52-584. Section 52-584 states, in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

The Appellate Court has clarified that § 52-584 creates two time requirements, "[t]he

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[8] As such, the court will not address the defendant's alternative ground for summary judgment, that the defendant does not owe the plaintiff a fiduciary duty.

[9] "Negligent infliction of emotional distress is subject to the two-year statute of limitations provided in General Statutes § 52-584. *Rivera* v. *Double A Transportation, Inc.*, 248 Conn. 21, 31, 727 A.2d 204 (1999)." (Footnote omitted.) *Brady* v. *Bickford*, Superior Court, judicial district of New London, Docket No. CV- 11-6007541-S (March 13, 2015, *Zemetis, J.*).

first requirement, referred to as the discovery portion . . . requires a plaintiff to bring an action within two years from the date when the injury is first sustained *or discovered* or in the exercise of reasonable care should have been discovered. . . . The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of. . . . The three year period specifies the time beyond which an action under § 52-584 is absolutely barred, and the three year period is, therefore, a statute of repose." (Emphasis in original; internal quotation marks omitted.) *Wojtkiewicz* v. *Middlesex Hospital*, 141 Conn. App. 282, 286-87, 60 A.3d 1028, cert. denied, 308 Conn. 949, 67 A.3d 291 (2013). "When applying § 52-584 to determine whether an action was timely commenced, this court has held that an injury occurs when a party suffers some form of actionable harm. . . . Actionable harm occurs when the plaintiff discovers . . . that he or she has been injured and that the defendant's conduct caused such injury. . . . The statute begins to run when the plaintiff discovers some form of actionable harm, not the fullest manifestation thereof. . . . The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories." (Internal quotation marks omitted.) Id., 287. In other words, "[o]nce the plaintiff has discovered her injury, the statute begins to run." (Internal quotation marks omitted.) Id.

As discussed, the present action was commenced on February 15, 2011. As to the claims

that apply the § 52-584 statutes of limitations period (reckless and wanton conduct and negligent infliction of emotional distress claims), these claims are barred by the two year discovery portion, which requires a plaintiff to bring an action within two years from the date when the injury is first sustained or discovered, or in the exercise of reasonable care should have been discovered. There is no genuine issue of material fact that the plaintiff has first discovered the injury and harm to his property, at the latest, in the 1980's,[10] and the present action was commenced more than twenty years after such discovery, which is well beyond the two year limitation period. Thus, the motion for summary judgment is granted as to count two, reckless and wanton conduct, and count six, negligent infliction of emotional distress.[11] [12]

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[10] The complaint alleges that the plaintiff began to notice stormwater damage due to drainage in the late 1980's, and expressed his concerns to the Conservation Commission. (Amended Complaint, ¶ 13; see also Defendant's Exhibit E, Plaintiff's First Set of Interrogatories, ¶ 7).

[11] Even though the plaintiff does not argue that the continuous course of conduct doctrine applies to the claims for reckless and wanton conduct and for negligent infliction of emotional distress, it should be noted that the doctrine is not applicable because "the continuing course of conduct and continuing treatment doctrine apply only to the repose portion of the statute and not to the discovery portion." (Internal quotation marks omitted.) *Calvert* v. *University of Connecticut Health Center*, Superior Court, judicial district of Hartford, Docket No. CV-13-6046661-S (October 10, 2014, *Peck, J.*) (59 Conn. L. Rptr. 110, 112), citing *Rosato* v. *Mascardo*, 82 Conn. App. 396, 405, 844 A.2d 893 (2004). Furthermore, "the continuing course of conduct doctrine . . . has no application after the plaintiff has discovered the harm." *Rosato* v.

5

Statute of limitations for breach of General Statutes § 13a-138 (count four)

Count four of the amended complaint alleges violation of General Statutes § 13a-138,[13] which requires the town to construct drainage of water so as to minimize damage to private property. More importantly, the statute of limitations for § 13a-138 is set out in General Statutes § 13a-138a, which states: "No action shall be brought by the owner of land adjoining a public highway, or of any interest in such land, for recovery of damage to such property or interest by

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Mascardo, supra, 405; see also *Rickel* v. *Komaromi*, supra, 144 Conn. App. 785 n.4 ("[a]fter the discovery of actionable harm, the policy behind [the continuing course of conduct doctrine] is no longer served" [internal quotation marks omitted]).

12

Because the defendant's motion for summary judgment may be granted as to the negligent infliction of emotional distress claim, the court need not address the defendant's alternative argument that Connecticut law does not allow for recovery for negligent infliction of emotional distress for injury to property.

13

General Statutes § 13a-138 states: "(a) Persons authorized to construct or to repair highways may make or clear any watercourse or place for draining off the water therefrom into or through any person's land so far as necessary to drain off such water and, when it is necessary to make any drain upon or through any person's land for the purpose named in this section, it shall be done in such way as to do the least damage to such land.

"(b) Nothing in this section shall be so construed as to allow the drainage of water from such highways into, upon, through or under the yard of any dwelling house, or into or upon yards and enclosures used exclusively for the storage and sale of goods and merchandise."

reason of any draining of water into or through such land by any town, city, borough or other political subdivision of the state pursuant to subsection (a) of section 13a-138, but within fifteen years next *after the first occurrence of such drainage*, except that if such drainage first occurred prior to October 1, 1981, no such action shall be brought after October 1, 1986." (Emphasis added.)

Based on the plain and unambiguous language of § 13a-138a, the statute of limitations for § 13a-138 begins to run after the first occurrence of improper drainage.[14] The plaintiff's complaint implies that increased upstream development, including the increase in culverts, the curbing of roads, and the installation of a sewer system, began sometime in the 1980's. The complaint further alleges that the plaintiff began to first notice damage due to drainage in the late 1980's. (See also Defendant's Exhibit E, Plaintiff's First Set of Interrogatories, ¶ 7).

Based on the plain language of § 13a-138a, to the extent that the first drainage occurred *prior* to October 1, 1981, the present action must have been commenced by October 1, 1986. The

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[14] In seeking to determine the meaning of statutory language, "General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Footnote omitted; internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 147, 989 A.2d 593 (2010).

present action would be barred under those facts because it was commenced on February 15, 2011.

Alternatively, to the extent that the first drainage occurred *after* October 1, 1981, a fifteen years statute of limitation period would begin to run from the first occurrence of such drainage. Based upon the allegations and available evidence, the drainage damage first occurred, at the latest, in the late 1980's. As such, the present action would be barred because it was commenced on February 15, 2011 - more than twenty years after the first occurrence.

Thus, for the forgoing reasons, there is no genuine issue of material fact that the plaintiff's § 13a-138 action is barred by the applicable statute of limitations.

6

Failure to satisfy elements of nuisance (count one)

"[A] plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the [plaintiff's] injuries and damages." (Internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 561-62, 23 A.3d 1176 (2011).

"In addition [to the four elements of nuisance], when the alleged tortfeasor is a municipality, our common law requires that the plaintiff also prove that the defendants, by some positive act, created the condition constituting the nuisance." *Picco* v. *Voluntown*, 295 Conn. 141, 146, 989 A.2d 593 (2010).

"A common-law private nuisance claim requires that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence. . . . Whether the interference is unreasonable depends upon a balancing of the interests involved under the circumstances of each individual case and should be [determined] in light of the fact that some level of interference is inherent in modern society. There are few, if any, places remaining where an individual may rest assured that he will be able to use and enjoy his property free from all interference. Accordingly, the interference must be substantial to be unreasonable." (Internal quotation marks omitted.) *Boyne* v. *Glastonbury*, 110 Conn. App. 591, 603, 955 A.2d 645, cert. denied, 289 Conn. 947, 959 A.2d 1011 (2008).

"The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor. . . . [I]n determining unreasonableness, [c]onsideration

must be given not only to the interests of the person harmed but also [to] the interests of the actor and to the interests of the community as a whole. . . . Ultimately, the question of reasonableness is whether the interference is beyond that which the plaintiff should bear, under all of the circumstances of the particular case, without being compensated. . . . Whether an interference is unreasonable is a question of fact for the fact finder." (Citations omitted; internal quotation marks omitted.) Id., 603-604.

First, as to the unreasonable interference with the plaintiff's enjoyment of property, the defendant relies on *Boyne* v. *Glastonbury*, supra, 110 Conn. App. 591, for the proposition that private nuisance requires an unreasonable interference with the plaintiff's enjoyment of land.

In *Boyne*, the plaintiff commenced a nuisance claim against the town to recover for injury to his land on account of a drainage ditch used by the town. Id., 594-95. The court held that that the trial court properly granted the defendant's motion for summary judgment with respect to count four because the plaintiff failed to offer any evidence that the defendant's interference with his future use and enjoyment of his property was unreasonable. Id., 604. In reaching its conclusion, the court noted that the damage to the property was minimal because "the drainage ditch never has flooded and likely never will flood the higher elevations of the plaintiff's property," and because "the only damage to the property alleged by the plaintiff is 'erosion of

the soil,' which is caused by the discharge of the storm water through the ditch." Id., 604-605. Further, with respect to the interests of the defendant and community, the court observed that "the ditch serves the obvious purpose of serving the community's need to divert and drain storm water safely and appropriately." (Internal quotation marks omitted.) Id., 605.

Moreover, as to the available evidence, the court noted: "The defendant submitted further evidence that the ditch capably handles significant storm events and essentially has maintained its same shape and configuration for at least one decade. In response, the plaintiff submitted no evidence as to the degree of the erosion that occurs other than his testimony that the erosion was extensive enough to cause an occasional tree to topple during periods of increased wind. Furthermore, the defendant submitted evidence, which the plaintiff has not disputed, that the plaintiff exacerbates any erosion that occurs by routinely dumping yard waste into the ditch." Id.

The court concluded "that the interference with the plaintiff's interest in the property, as a matter of law, is not so substantial as to be unreasonable." Id.

The present case is easily distinguishable from *Boyne*. Here, the plaintiff has alleged and provided evidence[15] of more significant property damage than alleged by the *Boyne* plaintiff.

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[15] Note that the plaintiff has incorporated all of the factual allegations in the operative complaint into his affidavit.

More specifically, the plaintiff has alleged and provided evidence of stormwater damage that has resulted in a decrease in water quality, stilting of water, and dramatic negative damage to local wildlife. (Amended Complaint, ¶¶ 4, 15; Affidavit of Plaintiff, ¶ 4; Affidavit of Gadwa, ¶¶ 4-7, 9). In addition, the plaintiff has alleged that, by drastically increasing the amount of upstream culverts, curbing the roads, and installing storm sewers, the defendant failed to follow the relevant water runoff management plans, including the 1981 Town of Glastonbury Master Drainage Report, the 1989 Inland Wetlands and Watercourses Commission Regulation, and the 2004 Storm Water Management Plan. Furthermore, unlike in *Boyne*, the plaintiff in the present case has provided evidence, both through his own testimony and an expert's affidavit, that there are feasible, low impact alternatives for water drainage. (Amended Complaint, ¶ 12; Affidavit of Plaintiff, ¶ 4; Affidavit of Gadwa, ¶ 8).

Based on the foregoing, there is a genuine issue of material fact as to whether the defendant's use of the drainage system was reasonable. See *Dichello* v. *Hamden*, Superior Court, judicial district of New Haven, Docket No. CV-10-6010524-S (May 10, 2011, *Burke, J.*) (holding that there is genuine issue of material fact whether the defendant's use of the drainage system was reasonable because there is no evidence that the system did not flood or that it had not deteriorated over time, and because the plaintiff presented evidence that there is another

feasible drainage method that would do less damage to the plaintiff's property).

Second, the defendant also argues that the plaintiff has failed to show, as required, that the defendant intentionally created the conditions alleged to create the nuisance by some "positive act." "[L]iability can be imposed on [a] municipality only in the event that, if the condition constitute[s] a nuisance, it was created by some positive act of the municipality." (Internal quotation marks omitted.) *Keeney* v. *Old Saybrook*, 237 Conn. 135, 164, 676 A.2d 795 (1996). "[T]he plaintiff must prove that the defendants, by some positive act, intentionally created the conditions alleged to constitute a nuisance." *Elliott* v. *Waterbury*, 245 Conn. 385, 421, 715 A.2d 27 (1998). A "failure to remedy a condition not of the municipality's own making is not the equivalent of the required positive act in imposing liability in nuisance upon a municipality." *Lukas* v. *New Haven*, 184 Conn. 205, 210, 439 A.2d 949 (1981). "Under the applicable common law . . . a municipality is liable for maintaining a nuisance only if, in fact, the municipality both created and maintained the nuisance by some positive act." *Starr* v. *Commissioner of Environmental Protection*, 226 Conn. 358, 388, 627 A.2d 1296 (1993). A municipality cannot be held liable for maintaining a public nuisance "if its conduct were merely negligent nonfeasance." *Keeney* v. *Old Saybrook*, supra, 164.

"It is the knowledge that the actor has at the time [the actor] acts or fails to act that

determines whether the invasion [of the public right] resulting from [its] conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that [its] conduct involves a serious risk or likelihood of causing the invasion. [The actor] must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from [the actor's] conduct. . . . If the invasion results from continuing or recurrent conduct, the first invasion resulting from the actor's conduct may be either intentional or unintentional; but [if] the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional." (Citation omitted; internal quotation marks omitted.) *Keeney* v. *Old Saybrook*, 239 Conn. 786, 788, 676 A.2d 715 (1997).

In *Blade Millworks, LLC* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5013039-S (July 27, 2010, *Brazzel-Massaro, J.*), the court held that the defendant's failure to operate, inspect, clean, repair and provide adequately sized storm drains and pump stations of the public wastewater system caused a back-up of the storm water system, and that these acts were over a five-year period, which may amount to an intentional act of failing to abate the nuisance. In reaching this conclusion, the court explained: "What is of greater weight are the factual allegations set forth by each of the plaintiffs in the first count of their allegations in the complaint that enumerate factual allegations concerning ongoing and

repeated difficulties that the plaintiffs contend existed from a time in 2002 until October 11, 2007 and caused the accumulation of water and the flooding to the plaintiffs' businesses. The plaintiffs allege in their counts of public nuisance that: The continual back-up of storm-water and sewer systems has a natural tendency to create danger and inflict injury upon City of Stamford inhabitants. The facts alleged specifically set forth a series of failures to act over a prolonged time that amount to an intentional failing to abate a drainage problem that resulted in flooding to the properties." Id.

In the present case, based upon the evidence submitted by the plaintiff, there is a genuine issue of material fact as to whether the defendant, by some positive act, intentionally created the conditions alleged to constitute a nuisance. In other words, there is a genuine issue of material fact as to whether the municipality both created and maintained the nuisance by some positive act. Specifically, the plaintiff has presented evidence that, in the 1980's, the defendant *wilfully ignored* the warnings of the 1981 MDR recommendations, and *intentionally* increased watercourse volume and incident damage by *installing* more storm water drains, and curbing roadways to more efficiently channel water into the storm sewers. (Amended Complaint, ¶ 8; Affidavit of Plaintiff, ¶ 4). These facts, taken together, are sufficient to create a genuine issue of material fact as to whether the defendant, by some positive act, intentionally created the

conditions alleged to constitute a nuisance.

Furthermore, even without the allegations of intentional construction of harmful structures upstream from the plaintiff's property, the plaintiff further stated that, more recently, the defendant widened, repaved, and curbed a street immediately upstream of the plaintiff's property, and directly channeled all stormwater into the brook upstream of the plaintiff's property, despite prior warnings of property damage by the plaintiff. (Amended Complaint, ¶ 13, 14; Affidavit of Plaintiff, ¶ 4, 8). This recurrent conduct that is continued after the defendant knows about the invasion that results from it is sufficient to create a genuine issue of material fact as to whether the defendant, through some positive act, intentionally created the conditions alleged to constitute a nuisance. See *Keeney* v. *Old Saybrook*, supra, 239 Conn. 788 ("[i]f the invasion results from continuing or recurrent conduct, the first invasion resulting from the actor's conduct may be either intentional or unintentional; but [if] the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional" [internal quotation marks omitted]); see also *Blade Millworks, LLC* v. *Stamford*, supra, Superior Court, Docket No. CV-09-5013039-S.

7

Governmental immunity as to trespass (count three) and intentional infliction of emotional distress (count five)

"A municipality itself was generally immune from liability for its tortious acts at common law . . . . Governmental immunity may, however, be abrogated by statute." (Citation omitted; internal quotation marks omitted.) *Tryon* v. *North Branford*, 58 Conn. App. 702, 720, 755 A.2d 317 (2000). "[General Statutes § 52-557n] abrogates the common-law rule of governmental immunity and sets forth the circumstances in which a municipality is liable for damages to person and property. These circumstances include the negligent acts or omissions of the political subdivision or its employees or agents, 'negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit' and acts which constitute the creation or participation in the creation of a nuisance. General Statutes § 52-557n (a). The section goes on to *exclude liability for acts or omissions of any employee or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct and negligent acts that involve the exercise of judgment or discretion.* General Statutes § 52-557n (a). The statute further sets forth ten other circumstances in which a municipality shall not be liable for

damages to person or property. General Statutes § 52-557n (b)."[16] (Emphasis added.) Id., 721. Thus, a "municipality may not be held liable for the intentional acts of its employees pursuant to § 52-557n (a) (2) (A), including intentional infliction of emotional distress." *Martin* v. *Westport*, 108 Conn. App. 710, 730, 950 A.2d 19 (2008); see also *Pane* v. *Danbury*, 267 Conn. 669, 685, 841 A.2d 684 (2004), overruled on other grounds by *Grady* v. *Somers*, 294 Conn. 324, 330, 984 A.2d 684 (2009).

First, as to trespass (count three), the defendant essentially argues that, pursuant to General Statutes § 52-557n (a) (2), a municipality is immune from intentional torts, such as the trespass claim.

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[16] General Statutes § 52-557n (a) states: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) *acts of the political subdivision which constitute the creation or participation in the creation of a nuisance*; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) *Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct*; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Emphasis added.)

Trespass to land is an intentional tort. *Robert* v. *Scarlata*, 96 Conn. App. 19, 23 n.1, 899 A.2d 666 (2006). The elements of an action for trespass are: "(1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) *done intentionally*; and (4) causing direct injury." (Emphasis added.) *Abington Ltd. Partnership* v. *Talcott Mountain Science Center*, 43 Conn. Supp. 424, 427, 657 A.2d 732 (1994) (11 Conn. L. Rptr. 349), citing *Avery* v. *Spicer*, 90 Conn. 576, 579, 98 A. 135 (1916). "[I]n order to be liable for trespass, one must intentionally cause some substance or thing to enter upon another's land." (Internal quotation marks omitted.) *Abington Ltd. Partnership* v. *Talcott Mountain Science Center*, supra, 427-28.

The defendant cites to two cases for the proposition that a municipality is immune from trespass claims. In *Donaghy* v. *Bristol*, Superior Court, judicial district of New Britain, Docket No. CV-07-6001200-S (May 20, 2008, *Gilligan, J.*), the plaintiff alleged that the defendant trespassed, as a result of its failure to execute proper flood control measures. The court held that a municipality cannot be held liable for an intentional tort, such as trespass.

In *Perreault* v. *Southington*, Superior Court, judicial district of New Britain, Docket No. CV-11-6008331-S (September 26, 2011, *Swienton, J.*), the court similarly held that, pursuant to § 52-557n (a) (2), the municipal defendant is immune from a trespass claim because trespass is

an intentional tort.

In contrast to the decisions in *Donaghy* and *Perreault*, the court in *Margaitis* v. *Morris*, Superior Court, judicial district of Litchfield, Docket No. CV-09-4008675-S (April 13, 2011, *Pickard, J.*) (51 Conn. L. Rptr. 738, 739), held that the plaintiff's "claim for damages based upon trespass is not subject to immunity because claims for damages caused by the discharge of surface waters from municipal highways are 'otherwise provided by law.'" More specifically, the court agreed with the plaintiff's argument that "liability of municipalities for damage to property due to diversion of water from public roads falls within the exemption from immunity provided by the language '[e]xcept as otherwise provided by law . . . .' within § 52-557n." Id. The court concluded that there is an exemption from immunity because the Connecticut common law allowed claims for damages caused by the municipal collection of surface water from highways and discharge onto private property; *Postemski* v. *Watrous*, 151 Conn. 183, 188, 195 A.2d 425 (1963); *Peterson* v. *Oxford*, 189 Conn. 740, 748, 459 A.2d 100 (1983); and because § 13a-138 provides a limitation on immunity.

The holding and reasoning in *Margaitis* is more persuasive than the holdings in *Donaghy* and *Perreault*. In the present case, the claim for damages based upon trespass is not subject to governmental immunity because the damage was allegedly caused by the discharge of surface

waters from municipal highways.

In addition, the plaintiff's request for injunctive relief based upon trespass is not subject to governmental immunity. See *Margaitis* v. *Morris*, supra, 51 Conn. L. Rptr. 739 ("[E]ven if governmental immunity applies to the claim of damages for trespass, it does not apply to the plaintiffs' claim for injunctive relief. By its terms, § 52-557n applies to damages, not injunctive relief. See [General Statutes] § 52-557n (b) (a): a municipality 'shall not be liable for damages to person or property . . . .'").[17]

Second, as to the claim for the intentional infliction of emotional distress (count five), the defendant may not be held liable for the intentional acts of its employees pursuant to § 52-557n (a) (2) (A), including intentional infliction of emotional distress. *Martin* v. *Westport*, supra, 108 Conn. App. 730. Unlike trespass claims that involve damage that was allegedly caused by the discharge of surface waters, there is no Connecticut exemption for intentional infliction of emotional distress claims. Furthermore, the plaintiff's argument that immunity only applies to

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[17] In addition, General Statutes § 52-557n (a) (2) similarly states, "Except as otherwise provided by law, *a political subdivision of the state shall not be liable for damages to person or property* caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Emphasis added.)

intentional infliction of emotional distress by employees is without merit because it is axiomatic that a government subdivision can act only through natural persons as its agents or employees. *O'Connor* v. *Board of Education*, 90 Conn. App. 59, 65-66, 877 A.2d 860, cert. denied, 275 Conn. 912, 882 A.2d 675 (2005) ("The plaintiff asserts several arguments in an effort to avoid the preclusive effect of § 52-557n (a) (2). He argues that this statutory provision applies only to the intentional torts of employees, but not to the conduct of municipalities. That argument lacks merit. It is axiomatic that a government subdivision can act only through natural persons as its agents or employees.").

Thus, there is no genuine issue of material fact that the defendant is immune from liability for damages as to count five, alleging intentional infliction of emotional distress. Nevertheless, the plaintiff's request for injunctive relief based upon intentional infliction of emotional distress is not subject to governmental immunity. See *Margaitis* v. *Morris*, supra, 51 Conn. L. Rptr. 738.[18]

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[18] The defendant's argument that governmental immunity applies to reckless and wanton conduct (count two) is not discussed because summary judgment may be granted as to that claim due to the applicable statute of limitations period.

C. Plaintiff's Motion for Summary Judgment

The plaintiff moves for summary judgment on the merits as to each count because there are no genuine issues as to any material facts pleaded for liability. More specifically, the plaintiff moves for summary judgment on the following grounds: (1) there is no genuine issue of material fact as to liability for count one, nuisance, and count three, trespass, because the defendant's increased upstream development caused reoccurring and increasing nuisance and trespass to the plaintiff's property; (2) there is no genuine issue of material fact as to liability for count two, reckless and wanton conduct, because the defendant recklessly failed to comply with the defendant's Master Drainage Report, the Stormwater Management Plan, and the Inland Wetlands & Watercourses regulations, which specified purpose is to prevent erosion and habitat loss; (4) there is no genuine issue of material fact as to liability for count four, the failure to comply with General Statutes § 13a-138, because the defendant failed to approve development in a manner which will do the least damage to such land; (5) there is no genuine issue of material fact as to liability for count five, intentional infliction of emotional distress, and count six, negligent infliction of emotional distress, because the defendant caused recurring and increasing damage to the plaintiff's property despite years of warning and protests by the plaintiff; (6) there is no genuine issue of material fact as to liability for count seven, breach a fiduciary duty to

plaintiff, because the defendant borrowed four acres of land for municipal school use in 1925, fabricated a secret $1500 deed for sale of these four acres, refused to return the land when the school burned down, and then sold the land for $1 in 1945 without allowing the plaintiff's grandfather to repurchase for $500.

In addition to the arguments that are presented in the defendant's motion for summary judgment, the defendant counters that summary judgment should be denied because there are genuine issues of material fact as to each count. The defendant further argues, in part, that the plaintiff's primary evidence is his own affidavit, and that most of the affidavit is not admissible because it is conclusory, self-serving, and/or constitutes hearsay.

The defendant's motion for summary judgment, however, has been granted as to count two, reckless and wanton conduct, count four, violation of § 13a-138, count six, negligent infliction of emotional distress, and count seven, breach of fiduciary duty.[19] As such, these counts will not be addressed in the context of the plaintiff's motion for summary judgment.

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[19] In addition, the defendant is immune from damages for count five, the intentional infliction of emotional distress.

1

Nuisance (count one), trespass (count three) and intentional infliction of emotional distress (count five)

"[R]ecent case law treats trespass cases as involving acts that interfere with a plaintiff's exclusive possession of real property and nuisance cases as involving acts interfering with a plaintiff's use and enjoyment of real property." (Internal quotation marks omitted.) *Rickel* v. *Komaromi*, supra, 144 Conn. App. 781.

"[A] plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the [plaintiff's] injuries and damages." (Internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, supra, 300 Conn. 561-62.

"A common-law private nuisance claim requires that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence. . . . Whether the interference is unreasonable depends upon a balancing of the

interests involved under the circumstances of each individual case and should be [determined] in light of the fact that some level of interference is inherent in modern society. There are few, if any, places remaining where an individual may rest assured that he will be able to use and enjoy his property free from all interference. Accordingly, the interference must be substantial to be unreasonable." (Internal quotation marks omitted.) *Boyne* v. *Glastonbury*, supra, 110 Conn. App. 603.

"[T]he essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury. . . . The invasion, intrusion or entry must be physical. . . . [I]n order to be liable for trespass, one must intentionally cause some substance or thing to enter upon another's land." (Citations omitted; internal quotation marks omitted.) *Rickel* v. *Komaromi*, supra, 144 Conn. App. 781-82.

Finally, "[i]n order to prevail upon a claim for intentional infliction of emotional distress, a plaintiff must establish: (1) that the [defendant] intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe."

(Internal quotation marks omitted.) *Watts* v. *Chittenden*, 301 Conn. 575, 605, 22 A.3d 1214 (2011).

In the present case, the defendant has raised genuine issues of material fact in the affidavit of Daniel Pennington, an engineer for the town of Glastonbury. Specifically, when there is a proposal for an individual development project, it goes through a regulatory process. (Defendant's Objection, Exhibit A, pp. 4-9). The developer is required to retain a private engineer to produce pre-development and post-development drainage analysis of the peak flow. (Defendant's Objection, Exhibit A, pp. 9-10). As such, it is not the defendant that performs this analysis. (Defendant's Objection, Exhibit A, p. 10). Rather, the defendant's engineers merely advise the boards and commissions on the design during the review process. (Defendant's Objection, Exhibit A, p. 10).

The 1981 Drainage Report is outdated, and is only used as a guide by the engineers. (Defendant's Objection, Exhibit A, pp. 4-5). The developer's engineer is required to propose a drainage system and means of mitigation, if necessary. (Defendant's Objection, Exhibit A, p. 10). The defendant requires installation of storm water infiltration devices where possible. (Defendant's Objection, Exhibit A, p. 7). There are a wide variety of factors that must be taken into account when one decides what mitigation measures would be appropriate in a given

location to mitigate or prevent adverse flow. (Defendant's Objection, Exhibit A, p. 8). Since the time that Pennington has been working for the defendant, the defendant's review process has taken into account these factors for mitigation. (Defendant's Objection, Exhibit A, p. 9). In addition, it is generally not acceptable not to curb a road or a parking lot, because the runoff will damage private property. (Defendant's Objection, Exhibit A, p. 40). Under those conditions, it is not possible to mitigate peak flow. (Defendant's Objection, Exhibit A, p. 40).

Finally, it is possible that climate change, especially an increase in intense precipitation, is responsible for the erosion and increase in volume flow on the plaintiff's property. (Defendant's Objection, Exhibit A, pp. 24, 29). Pennington does not believe that that the detrimental downstream effects were caused by negligent upstream development. (Defendant's Objection, Exhibit A, pp. 23-24).

As to all three causes of action, the defendant's evidence establishes a genuine issue of material fact as to causation because the alleged intrusion and damage to plaintiff's property may have been caused by other factors, such as climate change. In addition, Pennington states that the defendant has taken appropriate mitigation measures to prevent adverse flow.

Furthermore, as to the nuisance claim, the evidence that is summarized in the preceding paragraphs, especially the testimony regarding the various mitigation measures that the

defendant has undertaken, shows that there is a genuine issue of material fact also as to whether the interference with the plaintiff's use and enjoyment of his property was unreasonable. Moreover, as to both trespass and the intentional infliction of emotional distress, in view of the review of mitigation factors that the private engineers and the town have undertaken, there is a genuine issue of material fact as to whether the alleged wrongful acts were intentional. As to the intentional infliction of emotional distress claim, the testimony of Pennington also creates a genuine issue of material fact as to whether the defendant's conduct is extreme and outrageous. Therefore, there are genuine issues of material fact as to whether the elements of the nuisance, trespass, and intentional infliction of emotional distress claims have been satisfied.[20]

III

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted as to reckless and wanton conduct (count two), the violation of General Statutes § 13a-138 (count

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[20] In view of the various genuine issues of material fact as to the legal sufficiency of the claims, the court will not address whether there may also be genuine issues of material fact as to the statute of limitations defense for nuisance, trespass, and intentional infliction of emotional distress.

four), negligent infliction of emotional distress (count six), and breach of fiduciary duty (count seven), because these claims are barred by the applicable statute of limitations. Furthermore, the defendant is entitled to summary judgment as to any claim for damages for the intentional infliction of emotional distress claim (count five) because governmental immunity applies. Finally, the defendant's motion for summary judgment is denied as to nuisance (count one), and trespass (count three).

The plaintiff's motion for summary judgment is denied as to count two, count four, count six, and count seven, because the defendant is entitled to summary judgment as to those claims. Moreover, summary judgment is denied as to count one, count three, and count five, because there are genuine issues of material fact as to whether the elements of the nuisance, trespass, and intentional infliction of emotional distress claims have been satisfied.

SO ORDERED.

BY THE COURT

Wiese, J.

PETER EMMETT WIESE, JUDGE

May 14, 2015

CHECKLIST FOR CLERK

Docket Number HHD CV-11-5035304-S

Case Name Roger Emerick v. Town of Glastonbury

Memorandum of Decision dated 5-14-15

File Sealed: yes_____ no X

Memo Sealed: yes_____ no ✓

This memorandum of Decision may be released to the Reporter of Judicial Decisions for publication. ✓

This Memorandum of Decision may NOT be released to the Reporter of Judicial Decisions for publication. _____

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HHD-CV11-5035304-S EMERICK, ROGER v. GLASTONBURY TOWN OF

Prefix: PEC **Case Type:** T90 **File Date:** 02/17/2011 **Return Date:** 03/08/2011

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Information Updated as of: 05/14/2015

Case Information

Case Type: T90 - Torts - All other
Court Location: HARTFORD
List Type: JURY (JY)
Trial List Claim: 09/25/2014
Referral Judge or Magistrate:
Last Action Date: 01/26/2015 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party			No Fee Party
P-01	ROGER EMERICK **Self-Rep:** 580 HOPEWELL ROAD S GLASTONBURY, CT 06073	File Date: 02/17/2011	
D-50	GLASTONBURY TOWN OF **Attorney:** HOWD & LUDORF LLC (028228) 65 WETHERSFIELD AVENUE HARTFORD, CT 061141190	File Date: 03/17/2011	

Viewing Documents on Civil Cases:

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Entry No	File Date	Filed By	Description	Arguable